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November 3, 2000

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Magalie Roman Salas, Secretary
Federal Communications Commission
Portals II, 445 12th Street S.W.
Suite CY-B402
Washington, DC 20554

re: In the Matter of Application by Verizon New England, Inc., for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of Massachusetts (CC Docket No. 00-176).

Dear Ms. Salas:

Enclosed for filing please find one original and seven hard copies and one 3.5 inch computer diskette containing the Massachusetts Attorney General's Reply Comments. Please stamp one hard copy and return it to us in the enclosed prepaid, self-addressed envelope. I have filed a copy of the reply comments electronically with the Commission's ECFS service (proceeding number 00-176) and, as directed in the September 22, 2000 Public Notice, have sent twelve copies to Janice Myles of the Policy and Program Planning Division, and one copy to ITS.

Sincerely,

Karlen J. Reed
Assistant Attorney General
Regulated Industries Division

KJR/kr
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cc: Janice Myles, CCB (w/12 enc.)
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Application by Verizon New England Inc. for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of Massachusetts	)	CC Docket 00-176

MASSACHUSETTS ATTORNEY GENERAL'S REPLY COMMENTS

Respectfully submitted,

THOMAS F. REILLY
MASSACHUSETTS ATTORNEY GENERAL

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Dated: November 3, 2000

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APPENDIX

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Application by Verizon New England Inc. for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of Massachusetts	)	CC Docket 00-176

MASSACHUSETTS ATTORNEY GENERAL'S REPLY COMMENTS

Pursuant to the procedural schedule set by the Federal Communications Commission ("Commission" or "FCC") on September 22, 2000, the Attorney General of the Commonwealth of Massachusetts, Thomas F. Reilly ("Massachusetts Attorney General"), submits these Reply Comments. The Massachusetts Attorney General has reviewed more than 125 comments filed by competitive local exchange carriers ("CLECs") and others, including the October 16, 2000, redacted report by the Massachusetts Department of Telecommunications and Energy ("DTE") and the October 27, 2000, evaluation by the U. S. Department of Justice, Antitrust Division, Telecommunications Task Force ("Justice"). Unless specifically noted otherwise, this review has not caused any change in the positions set forth in the Massachusetts Attorney General's October 16, 2000 Comments.[1]

I. SUMMARY OF ARGUMENT

The Massachusetts Attorney General continues to urge the Commission to withhold approval of the September 22, 2000, Application ("Application") filed by Verizon New England,

[1] No attempt has been made to respond to all of the arguments made and positions taken by the commenters. Silence regarding any specific argument raised in the commenters' initial comments should not be taken as agreement by the Massachusetts Attorney General.

Inc., et al. (collectively, "Verizon" or "the Company"), with the Commission for authority to provide in-region interLATA service in the Commonwealth of Massachusetts pursuant to Section 271 of the Telecommunications Act of 1996.[2] The Commission should disregard the DTE's finding that Verizon's revised UNE switching prices are cost-based because the DTE refused to investigate those prices before approving them, contrary to Commission precedent. Additionally, the Massachusetts Attorney General joins the U.S. Department of Justice and other commenters who contend that Verizon's digital subscriber line ("DSL") data, procedures, and provisioning are inadequate and call for the creation of additional DSL metrics and a new Mode of Entry to measure Verizon's DSL performance.

II. ARGUMENT

A. Verizon has not satisfied Checklist Item Number 2 - UNE pricing

In his October 16, 2000 Comments, the Attorney General argued that the Commission should not find that Verizon had satisfied Checklist Item Number 2, *i.e.*, that the Company had not demonstrated that it provides nondiscriminatory access to network elements in accordance with §§ 251(c)(3) and 252(d)(1) of the Act. The Attorney General pointed out that unrebutted record evidence supported findings that: (1) Verizon's Massachusetts UNE switching prices for port and switching usage are multiples of the analogous rates in New York and Pennsylvania (50 to 200 percent in the case of usage rates), and (2) the Massachusetts UNE switching prices are based on switch "costs" that are inconsistent with both the FCC's TELRIC benchmarks and the

[2] The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("the Act").

Company's own accounting of its switch costs.[3] While ultimately deferring to the Commission's expertise on rate making questions, the U.S. Department of Justice cited these disparities in its October 27 evaluation of Verizon's application as "reasons to suspect that in some cases [Verizon's UNE] prices have not been based on the relevant costs of the network elements" and urged the Commission to give consideration to this factual information in its evaluation of Verizon's Massachusetts 271 application.[4]

In its October 16 "evaluation" of Verizon's application, the DTE reached a different conclusion. Based on findings it had made in prior proceedings concerning Verizon's UNE rates, the DTE found that the Company "is in compliance with the terms of checklist item 2 in terms of pricing for network elements."[5] Importantly, the DTE's evaluation expressly excluded any consideration of the striking disparities between the purported TELRIC switch "costs" on which Verizon's UNE rates are based and the Company's actual switch costs or the Commission's benchmark switch costs, as well as the disparity between Verizon's Massachusetts UNE rates and those adopted in other jurisdictions. The DTE explained its refusal to consider the unrebutted evidence that Verizon's UNE switching rates are unjust and unreasonable on the grounds that: (1) disparities between TELRIC and actual costs are "irrelevant;" (2) the Commission itself had "twice cautioned parties not to" make comparisons to the universal service switch cost benchmarks; and (3) it is understood that "application of TELRIC principles

---

[3] Massachusetts Attorney General's October 16, 2000 Comments at 4.

[4] Justice Evaluation at 19-21.

[5] DTE redacted evaluation at 204-211, 213.

may result in different rates in different states."[6]

Notwithstanding the deference which the Commission has accorded to the views of state commissions in setting TELRIC rates, the Commission should disregard the conclusion of the DTE in regard to Verizon's satisfaction of Checklist Item Number 2. As explained below, that conclusion is not consistent with past Commission consideration of pricing disputes and, in any event, the DTE has not initiated the process nor put into place the protections that the Commission has determined are necessary to grant a 271 application in the face of price disputes.

1. The DTE erred in failing to consider unrebutted record evidence regarding Verizon's UNE switching prices.

The Commission should reject the DTE's conclusion that Verizon's current UNE prices satisfy the requirements of Checklist Item Number 2. Notwithstanding its recitation of broad, though uninformative, generalizations to explain its failure to even consider concrete evidence suggesting that Verizon's UNE switching rates are excessive —

- "it is irrelevant whether ... actual incremental costs are different from ... [TELRIC] costs";
- The FCC has "caution[ed] parties from making any claims in other proceedings based upon the input values" used to develop universal service switch cost findings; and
- "application of TELRIC principles may result in different rates in different states"

— the DTE utterly failed to address adequately the genuine dispute that exists regarding the

---

[6] DTE redacted evaluation at 214, and 217-218, quoting *AT&T Corp. v. FCC*, 220 F.3d 607, 615 (D.C. Cir. 2000).

appropriateness of Verizon's UNE prices.[7] Moreover, the DTE has failed to initiate the actions necessary to allow approval of a 271 application in the face of this dispute: it has not opened an investigation into Verizon's UNE rates nor has it acted to make those rates "interim" in nature, with provision for refunds or surcharges in the event that they are later adjusted. *Compare In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, CC Docket No. 99-295, (rel. December 22, 1999) ("New York Approval Order") at ¶¶ 244-247; *In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc d/b/a Southwestern Bell Long Distance*, Memorandum Opinion and Order, CC Docket No. 00-65 (rel. June 30, 2000) ("Texas Approval Order") at ¶¶ 236-242.

First, the Massachusetts Attorney General emphasizes that he has not argued that the evidence regarding the relatively exorbitant basis for and level of Verizon's UNE switching rates require or, indeed, would support the adoption of any particular level of new rates for the Company's Massachusetts operations. The DTE is correct that such information is not a proper basis for fixing TELRIC rates. However, the Massachusetts Attorney General has argued, and the U.S. Department of Justice appears to agree, that this evidence casts substantial doubt on the appropriateness of Verizon's UNE switching rates and its satisfaction of Checklist Item

[7] DTE redacted evaluation at 204, 207, and 208.

Number 2.[8]

While the Attorney General does not question the DTE's observation that "TELRIC is not designed to match historic and actual costs of the ILEC,"[9] that the fact that Verizon's purported TELRIC switch costs are more than twice its actual costs is clear and convincing evidence that the Company's UNE switching rates are built upon a fundamentally flawed foundation and are "outside the range that the reasonable application of TELRIC principles would produce." *New York Approval Order*, ¶ 244. As the Commission is well aware, the rapidly evolving technology and economic structure of the telecommunications industry has led to considerable reductions in the cost of providing services and the incumbent local exchange carriers' most pronounced complaint has been that TELRIC pricing would lead to an inability to recover their actual, higher historic costs. *See e.g., Iowa Utilities Board v. F.C.C.*, 219 F.3d 744, 749-751 (8th Cir. 2000). Although an appropriate TELRIC switch rate cannot be specified solely on the basis of the fact that Verizon's purported TELRIC switch costs are a multiple greater than its actual costs, this reversal of the ordinary relationship between these measures (*i.e.*, where TELRIC costs are less than actual costs) does support a finding that the current rate is not an appropriate TELRIC rate.

Similarly, the Massachusetts Attorney General agrees that neither the level of TELRIC switch costs produced by the Commission universal service model nor the level of UNE rates adopted in other Verizon states are necessarily indicative of the appropriate level of UNE

---

[8] Massachusetts Attorney General's October 16, 2000 Comments at 3-5; Justice Evaluation at 19-21, 24.

[9] DTE redacted evaluation at 214.

switching prices for the Company's Massachusetts operations.[10] However, evidence of significant disparities is compelling evidence that the relatively anemic state of UNE-platform entry into the local service market in Massachusetts is the result of unreasonably high UNE switching rates and that the Company should not be found to have satisfied Checklist Item Number 2 until those rates are reviewed. *Accord Justice Evaluation at* 19.

2. The DTE failed to establish the necessary procedures to review the UNE rates, so the rates should be given no probative weight.

Even if the Commission elects to consider Verizon's last minute modification to its UNE switching rates in its evaluation of the Company's 271 application, notwithstanding the clear violation of the Commission's "complete as filed" directive, the Massachusetts Attorney General submits that the application must nevertheless be denied because the DTE has failed to initiate the process and to provide the protections required by this Commission. In particular, while the Commission has approved 271 applications in circumstances where there were active disputes

---

[10] This is in apparent contrast to the views of Verizon and the DTE. On October 13, 2000, and on October 18, 2000, Verizon filed for approval and the DTE approved, without any investigation, new revised UNE switching rates for Verizon's Massachusetts operations that purport to be equivalent to Verizon's New York rates. The Company did not include in either filing any demonstration that the proposed rates were, in fact, equivalent to New York rates or that the rates were appropriate in light of Verizon's Massachusetts costs. As discussed *infra*, the DTE's same day approval of the proposed new rates effectively negated the opportunity for an investigation of those rates or having those rates deemed "subject to refund." In light of the lack of any supporting information in the Company's October 13 and 18 filings and the DTE's decision to forego the customary investigation into the proposed new rates, the Massachusetts Attorney General is not in a position to provide any comment on the October 13 and 18 filings other than to echo the observation of the U.S. Department of Justice that the DTE's consideration of the last minute filing is not consistent with the Commission's "complete as filed" directive and that this timing alone would justify "restarting the clock" on the Verizon filing. Justice Evaluation at 20-21, n. 69.

over ILEC wholesale prices, those approvals were expressly predicated on findings that the relevant state commission had opened an investigation into the dispute and provided that the disputed rates were only "interim," and were subject to refund or surcharge in the event of their subsequent modification.[11] Although the Company's October 13, 2000 rate filing provided an opportunity for the DTE to initiate an investigation and to make the new rates subject to refund, the Department did not avail itself of that opportunity. As a result, the Company's revised UNE switching rates are not now the subject of an investigation and are "final" rates, from which refunds cannot be ordered without violating the long-standing prohibition on retroactive ratemaking. *City of Newton v. Department of Public Utilities*, 367 Mass. 667, 678-680, 328 N.E.2d 885 (1975) (absent an express grant from the legislature, the DTE lacks the authority to order reparations); *Metropolitan District Commission v. Department of Public Utilities*, 352 Mass. 18, 26, 224 N.E.2d 502 (1967).

B. Verizon has not satisfied Checklist Items Numbers 2 and 4 - DSL loops and DSL line sharing

Based upon his review of comments filed in this proceeding by other parties, particularly the October 27, 2000 Comments by the U.S. Department of Justice ("Justice"), and the October 16, 2000 Comments of Rhythms Links ("Rhythms"), Covad Communications ("Covad"), Association for Local Telecommunications Services ("ALTS"), and WorldCom, Inc. ("WorldCom"), the Massachusetts Attorney General agrees that Verizon has failed to demonstrate that it has satisfied Checklist Item Numbers 2 and 4 in regard to providing DSL

[11] New York Approval Order at ¶ 259; Texas Approval Order at ¶¶ 239, 241.

services. In particular, the Attorney General agrees that there is an insufficient amount of verified DSL data and metrics to accurately evaluate Verizon's performance on DSL and DSL line sharing.[12] Even though the Massachusetts Attorney General alerted the DTE in July and August of this year to the lack of adequate Verizon DSL metrics, the DTE did not require KPMG, the third party tester of Verizon's OSS, to revise its test deck to include the March 9, 2000, DSL metrics adopted by the New York Public Service Commission.[13] This aspect of KPMG's final report, therefore, and the DTE's findings that rests upon it to support Verizon's DSL services, do not include verified test results and should be disregarded.

The Commission should adopt the proposal set forth by Rhythms and supported by Covad and WorldCom that Verizon, prior to receiving Section 271 approval, must include additional DSL and DSL line sharing metrics in the Performance Assurance Plan ("PAP") and an additional Mode of Entry ("MOE") category specifically for DSL and DSL line sharing.[14] The Massachusetts Attorney General also asserts that the annual liability cap of the PAP must be

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[12] Justice Evaluation at 15-17; Rhythms October 16, 2000, Comment at 39; WorldCom October 16, 2000 Comment at 61; Covad October 16, 2000 Comment at 47; ALTS October 16, 2000 Comment at 49.

[13] Massachusetts Attorney General's July 18, 2000, Comment at 9-10 (Attachment C to the Attorney General's October 16, 2000 Comments); Massachusetts Attorney General's August 22, 2000 Comment at 1-2 (attached herein as "Attachment A"); Justice Evaluation at 15; Rhythms October 16, 2000 Comment at 29.

[14] Rhythms October 16, 2000 Comment at 39; Covad October 16, 2000 Comment at 47-48; WorldCom October 16, 2000 Comment at 59.

increased to reflect the additional metrics and MOE.[15] Until these modifications have been included, the Massachusetts Attorney General urges the Commission to withhold approval for Verizon's application.

III. CONCLUSION.

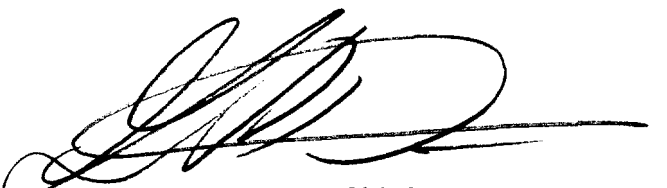
The Commission should not approve the application by Verizon to enter the long distance Massachusetts market because Verizon has not demonstrated compliance with Checklist Items Numbers 2 and 4. Verizon has not shown that its UNE switching prices are based on Massachusetts costs, and the Department did not investigate the proposed tariff revisions before approving the new rates. Furthermore, the Massachusetts Attorney General agrees with various

[15] Verizon filed a revised PAP on October 27, 2000, purportedly to address deficiencies in the PAP identified by AT&T and Rhythms. The Massachusetts Attorney General notes, in his preliminary review of the new PAP, that a new clause, "with the Department's approval" included in Attachment A, Section II.K.2 of the PAP, appears to require the DTE to make additional findings and allows Verizon and competitors an opportunity to convince the DTE not to incorporate metrics and PAP changes that were adopted by the New York Public Service Commission, which runs contrary to the DTE's September 5, 2000, order (DTE 99-271). This clause raises questions about the New York-to-Massachusetts incorporation process which should be clarified.

commenters that Verizon has not demonstrated that it is providing its competitors with nondiscriminatory access to its DSL services.

Respectfully submitted,

THOMAS F. REILLY
MASSACHUSETTS ATTORNEY GENERAL



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Dated: November 3, 2000

"ATTACHMENT A"

MASSACHUSETTS ATTORNEY GENERAL'S AUGUST 22, 2000 COMMENTS, DTE 99-271

August 22, 2000

Sent via e-mail and fax, hand delivery or U.S. Mail

Mary L. Cottrell, Secretary
Massachusetts Department of Telecommunications and Energy
One South Station, 2nd Floor
Boston, MA 02110

re: Verizon-Massachusetts' Section 271 Filing, D.T.E. 99-271

Dear Secretary Cottrell:

On August 17, 2000, the Department of Telecommunications and Energy ("Department" or "DTE") announced its decision not to incorporate documents from D.T.E. 98-57 Phase III, *Verizon-Massachusetts' DSL and DSL line sharing tariff*, into the record for D.T.E. 99-271.[16] The Attorney General, pursuant to 220 C.M.R. § 1:10(3)[17] and as directed by the Department,[18] submits his written request that the Department reconsider its decision, and incorporate by reference the Initial Brief ("Brief") filed by the Attorney General on August 17, 2000, in D.T.E. 98-57 Phase III, together with the exhibits and testimony referenced in the Brief, and make it part of the record for D.T.E. 99-271.

As previously stated during the August 17 hearing, the Attorney General submits that the current record developed in D.T.E. 99-271 will be insufficient for either the Department or the

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[16] Tr. Vol. 22 at 2532-2533. Rhythms Links expressed its support for reconsideration at the hearing. *Id.* at 2544. The presiding hearing officer, at a break during the August 17 hearing, allowed counsel until Tuesday, August 22, 2000, to file written requests for reconsideration on incorporation into the record.

[17] 220 CMR § 1.10(3) provides that:

> Any matter contained in any records, investigations, reports and documents in the possession of the Department of which a party or the Department desires to avail itself as evidence in making a decision, shall be offered and made a part of the record in the proceeding. Such records and other documents need not be produced or marked for identification, but may be offered in evidence by specifying the report, document or other file containing the matter so offered.

[18] Tr. Vol. 22 at 2543-2544.

Federal Communications Commission ("FCC") to render a decision on Checklist Item Number 4 regarding digital subscriber line ("DSL") loops.[19] Checklist Item Number 4 includes DSL loops and requires Verizon to provide local loop transmission from the central office to the customer's premises, unbundled from local switching or other services.[20] Unless the Department incorporates certain relevant information regarding Verizon-Massachusetts' proposed DSL and DSL line sharing tariff contained in D.T.E. 98-57 Phase III, neither the Department nor the FCC can appropriately address, or render a decision on, Verizon's submission. The Attorney General, in his Brief, recommended that the Department modify Verizon-Massachusetts' DSL tariff as follows:

1. The data competitive local exchange carriers ("DLECs") should have access to loops containing digital loop carriers;
2. DSL line sharing rates should be priced more accurately;
3. The Department should reduce certain intervals and mechanize Verizon's DSL line sharing operation support systems ("OSS") by April 1, 2001; and
4. The Department should reference DSL and DSL line sharing metrics in the tariff.[21]

Incorporation by reference of the Brief and underlying exhibits and testimony is the most administratively efficient method of ensuring a complete record on this issue. The Attorney General sees no reason to duplicate the record in D.T.E. 98-57 Phase III through cross-examination in this proceeding when the Department's rules provide an efficient remedy.

Given the emphasis placed by the FCC on DSL issues in its prior decisions regarding New York and Texas Section 271 applications,[22] the Department would be remiss in not including relevant information from D.T.E. 98-57 Phase III into this proceeding, whether by incorporation by reference or by direct filing. Exhibit "A," enclosed with this letter, will help the Department identify the particular portions of the D.T.E. 98-57 Phase III record which, in the Attorney General's view, the Department should incorporate in the D.T.E. 99-271 record on DSL issues.[23]

---

[19] Tr. Vol. 22 at 2543.

[20] Section 271(c)(2)(B)(iv) of the Telecommunications Act of 1996. Verizon is required to offer unbundled DSL loops to data competitive local exchange carriers ("DLECs") in a tariff format pursuant to orders by the Department and the FCC. Brief at 2.

[21] Brief at 2.

[22] *See* Attorney General's July 18, 2000, Comments, D.T.E. 99-271, at 3-4, 7-10.

[23] The Attorney General is aware that other parties may wish to include other materials from D.T.E. 98-57 Phase III. Therefore, the Attorney General will work with those parties to supplement Exhibit "A" and provide the Department with a comprehensive list for the record of

(continued...)

Sincerely,

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[23](...continued)
all documents to be incorporated by reference consistent with the approach used in other recent dockets. *See Cambridge Electric Light Company/Commonwealth Electric Company*, D.T.E. 99-90 (an agreed upon list of exhibits and transcripts from the Companies' restructuring docket, D.T.E. 97-111 and asset divestiture docket, D.T.E. 98-78, was developed to assist the Department in its decision).

EXHIBIT "A" - Referenced Exhibits and Testimony in D.T.E. 98-57 Phase III

Document Number	D.T.E. 98-57 Phase III Referenced Exhibits and Testimony
1	Transcripts of evidentiary hearings held on August 1-3, 2000.
2	Rhythms/Covad Direct Testimony.
3	Rhythms record response to RR-DTE-13.
4	RLI/CVD Exhibits 116, 117, and 119.
5	Verizon Rebuttal Testimony.
6	DBC Direct Testimony at 16.
7	Covad's record response to RR-AG-1.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Application by Verizon New England Inc. for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of Massachusetts	)	CC Docket 00-176

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